

TCEQ DOCKET NO. 2010-0837-WR

APPLICATION BY	§	BEFORE THE
	§	
CITY OF LUBBOCK TO AMEND	§	TEXAS COMMISSION ON
	§	
WATER RIGHT PERMIT NO. 3985	§	ENVIRONMENTAL QUALITY

EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) files this response to the hearing requests filed on the City of Lubbock's (Lubbock) application to amend Water Right Permit No. 3985. Nine timely requests for a hearing were filed. The hearing request filed by Chocolate Bayou Water Company was subsequently withdrawn. Of the remaining eight hearing requests, the Executive Director recommends that six hearing requests be granted and two be denied.

I. BACKGROUND

The City of Lubbock holds an existing permit, Permit No. 3985, that authorizes the City of Lubbock (City) to use within the Brazos River Basin, 22,910 acre feet of return flows per year, for industrial and agricultural uses. The City seeks to amend this permit to authorize the diversion and use of all historic and future discharges of Canadian River Basin surface water-based return flows and groundwater-based return flows, including up to 10,081 acre feet a year from its TPDES Permit No. 10353-002, for agricultural, municipal, industrial and recreational purposes anywhere within Lubbock and Lynn Counties. The effluent from this TPDES permit is both surface water (from the Canadian River Basin) and groundwater based. The City seeks to convey these return flows via bed and banks authorization from the discharge point to two diversion points using the North Fork Double Mountain Fork Brazos River.

The draft permit would grant (in lieu of the existing appropriation), 32,991 acre feet of historic and future return flows and additional future return flows discharged pursuant to TPDES Permit No. 10353-002, being up to 22,910 acre feet per year created as a result of the City's municipal water purchased from Canadian River Municipal Water Authority, and up to 10,081 acre feet of groundwater-based return

flows for agricultural, municipal, industrial, and recreational purposes in Lubbock and Lynn Counties.

II. PROCEDURAL HISTORY

This application was filed on April 27, 2004. The ED declared the application administratively complete on October 12, 2004. Notice of the application was mailed to downstream water right holders on December 22, 2004 and mailed to two persons that were not included in first mailing on February 10, 2005. The comment period ended for the first notice on February 14, 2005 and for the supplemental notice on March 14, 2005. The draft permit was mailed to the parties on November 17, 2009. A revised draft permit was sent on December 3, 2009. Nine timely hearing requests were filed. Chocolate Bayou Water Company subsequently withdrew its hearing request, leaving eight hearing requests.

III. LEGAL AUTHORITY

The application is subject to the procedures for evaluating hearing requests on applications declared administratively complete on or after September 1, 1999 in 30 Tex. Admin. Code, Chapter 55, Subchapter G (Sections 55.250-55.256).

Title 30, Sections 55.251 (b) and (c) of the Texas Administrative Code specify that a hearing request must:

- 1) be in writing and be filed with the Office of the Chief Clerk during the public comment period;
- 2) give the name, address, and daytime telephone number of the person who files the request;
- 3) identify the person's personal justiciable interest affected by the application including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the activity that is the subject of the application and how and why the requestor believes he or she will be affected by the activity in a manner not common to members of the general public; and
- 4) request a contested case hearing.

A hearing request must comply with requirement (1) above and must "substantially comply" with requirements (2) through (4). 30 Tex. Admin. Code § 55.251(c).

A request for a contested case hearing must be granted if the request is made by an affected person and the request:

- A) complies with the requirements of 30 Tex. Admin. Code § 55.251;
- B) is timely filed; and
- C) is pursuant to a right to hearing authorized by law.

30 Tex. Admin. Code § 55.255(b)(2).

An “affected person” is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to the general public does not constitute a justiciable interest. 30 Tex. Admin. Code § 55.256(a).

For a group or an association, the hearing request may be granted if the group shows that one or more of the members would have standing to be a party in his or her own right, the interests the group seeks to protect are germane to the group’s purpose, and the claim asserted would not require the presence of the individual members. 30 Tex. Admin. Code § 55.252(a).

To determine whether a person is an affected person, all relevant factors must be considered, including but not limited to:

- 1) whether the interest claimed is one protected by the law under which the application will be considered;
- 2) distance restrictions or other limitations imposed by law on the affected interest;
- 3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- 4) the likely impact of the regulated activity on the health, safety, and use of property of the person;
- 5) the likely impact of the regulated activity on the use of the impacted natural resource by the person; and
- 6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 Tex. Admin. Code § 55.256(c).

IV. HEARING REQUESTS

All eight of the hearing requests were received timely and met the requirements of 30 Tex. Admin. Code § 55.251. The commission received hearing requests from the following:

1. Michael and Justin Damron
2. John O. Long
3. R. E. Janes Gravel Company
4. Clark Wood
5. Marianne and John Loveless
6. Lynn Forrest
7. Martha Jean Forrest McNeely
8. Forrest Family Partnership

The Executive Director recommends that the hearing requests of Michael and Justin Damron and John O. Long be denied, unless the requestors can provide additional information showing how their water right could be affected by the City of Lubbock's application. The Executive Director recommends that the rest of the hearing requests be granted because each requestor holds a water right ...

Each hearing requestors' arguments and the Executive Director's responses are as follows:

1. On January 28, 2005, attorney George H. Nelson filed a hearing request on behalf of four hearing requesters: Clark Wood, Jr., Lynn Forrest, John O. Long and Michael and Justin Damron. The hearing request states that Mr. Wood holds Water Right Permit No. 3709. He owns property on the North Fork Double Mountain Fork of the Brazos River, approximately seven miles downstream of the last diversion point in the application. Mr. Wood is concerned that the wording of the draft permit is not specific enough to determine what amount can be discharged and diverted from the river and at what times. This could impact his water right, and disturb the natural or normal flow of the river.

As owner of a downstream water right, Mr. Wood has an interest protected by law that could be impacted by the application in a manner not common to the general public. Therefore, Mr. Wood meets the definition of an affected person and his hearing request should be granted.

2. Lynn Forrest is also represented in the hearing request letter of attorney George H. Nelson. Mr. Forrest raises the same objections as Mr. Wood in the hearing request filed on their behalf. Mr. Forrest owns property near the diversion point described in the application; his property runs east-southeast of the diversion point about seven miles. Mr. Forrest is evidently a domestic and livestock user.

As a domestic and livestock user downstream of the application, Mr. Forrest could be impacted by this application. Therefore, Mr. Forrest meets the definition of an affected person and his hearing request should be granted.

3. John O. Long is the third party to the hearing request filed by attorney George H. Nelson on January 28, 2005. His concerns are the same as those of Clark Wood, Jr. and Lynn Forrest. However, based on the information provided, it appears that Mr. Long's diversion point is upstream of the City of Lubbock's proposed diversion point. Therefore, there is no potential for harm to his water right. Mr. Long has not raised any additional factors that could qualify him as an affected person under the rules. Therefore, Mr. Long does not meet the definition of an affected person and his hearing request should be denied unless additional

information is provided showing how his water right could be affected by the City of Lubbock's proposed downstream diversion.

4. Michael and Justin Damron are the final party to the request filed by attorney George H. Nelson on January 28, 2005. Their concerns are the same as those of Clark Wood, Jr., Lynn Forrest, and John O. Long. However, based on the information provided, it appears that the Damrons' diversion point is upstream of the City of Lubbock's proposed diversion point. Therefore, there is no potential for harm to their water right. The Damrons have not raised any additional factors that could qualify them as affected persons under the rules. Therefore, the Damrons do not meet the definition of affected persons and their hearing request should be denied unless additional information is provided showing how their water right could be affected by the City of Lubbock's proposed downstream diversion.
5. Mr. Mike Schneider of R.E. Janes Gravel Company (Janes) filed a letter requesting a hearing on January 31, 2005, which was followed by a letter from his attorney, Mr. Scott Shoemaker. Janes holds a water right to divert 450 acre feet to an off-channel reservoir for use in its sand and gravel mining operations to clean and process rock and sand. In its hearing request letters, Janes states that it is located approximately eleven (11) miles downstream of the City's proposed diversion point. Janes points out that in recent years, the North Fork has stopped flowing during the summer months. Janes is concerned that any diversion by the City not simultaneous with its discharge could adversely affect Janes' ability to divert water and continue to operate and fulfill commitments to its customers. Janes contends that it is an affected person because it has an interest protected under the law and could be adversely impacted by this application.

As holder of a downstream water right, Janes has an interest protected by law that could be affected by the application in a manner not common to the general public. Therefore, Janes' hearing request should be granted.

6. Marianne and John Loveless own property within eleven (11) miles downstream of the proposed diversion point. They are concerned primarily about cattle grazing, farming, water quality, and wildlife.

The Lovelesses appear to be domestic and livestock users downstream of the proposed diversion point and therefore could be impacted by the permit amendment. Therefore, the hearing request of Marianne and John Loveless should be granted.

7. Martha Jean Forrest McNeely filed a hearing request on February 1, 2005, stating that she owns land adjacent to the diversion point described in the application. She believes this permit could interfere with the flow of water

at her location, disabling the personal and commercial use and enjoyment of her property which is leased for cattle grazing.

Although Ms. McNeely emphasizes her leasing operation, she also mentions her personal enjoyment of the land. She is evidently a domestic and livestock user and could be impacted by the permit amendment. Therefore, Ms. McNeely's hearing request should be granted.

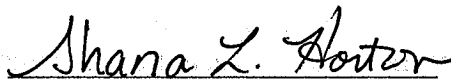
8. Ms. Cathey Colwell sent a hearing request on behalf of the Forrest Family Partnership (partnership). Susan Evans Forrest Sparkman, Cathey Forrest Colwell, Laurie Forrest Moy, and David Lamar Forrest make up the Forrest Family Partnership. This partnership owns land adjacent to the diversion point. The partnership is concerned that exercise of the permit, if granted, would interfere with the flow of water in the river running through its property, disabling the personal and commercial use and enjoyment of the property, which is leased out for cattle grazing.

Although the partnership emphasizes the leasing operation, it also mentions its members' personal enjoyment of the land. The partners are evidently domestic and livestock users and could be impacted by the permit. Therefore, its hearing request should be granted.

V. CONCLUSION

Therefore, the Executive Director recommends granting the hearing requests of R. E. Janes Gravel Company, Clark Wood, Marianne and John Loveless, Lynn Forrest, Martha Jean Forrest McNeely, and the Forrest Family Partnership, and denying the requests of Michael and Justin Damron and John O. Long.

Respectfully submitted,

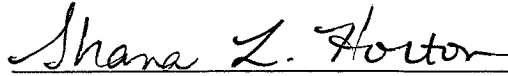


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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of December, 2010, a true and correct copy of the Executive Director's Response to Hearing Requests for Docket No. 2010-0387-WR was filed with the Chief Clerk of the Texas Commission on Environmental Quality and sent by First Class Mail to all hearing requesters or their representative, as listed below.



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